(1)

Supreme Court, U.S.
FILED

95-214 AUG 7 - 1995

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19____

SYLVIA DeANGELIS, Petitioner

v.

EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas A. Spieczny
Counsel of Record for Petitioner
521 Texas Avenue
El Paso, Texas 79901
(915) 533-5581

20 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's finding of factual insufficiency is such an atrocious departure from accepted standards of judicial review as to warrant the Supreme Court's exercise of its supervisory powers?

2. Whether the Supreme Court will review factual sufficiency determinations when a court of appeals misstates the record?

In accordance with **Rule 14(b)** of the Supreme Court Rules, the parties to these proceedings are identified in the caption of the case. There is a companion case pending in the 120th District Court in El Paso County, Texas (No. 90-2568) wherein the following female police officers are plaintiffs:

1. Mary Barrett
2. Lilia Beard
3. Sherri Campos
4. Maria Luisa Carrillo
5. Sandra Rau Chavez
6. Teresa Chavira
7. Rosalia Cubillos
8. Sylvia DeAngelis
9. Lucille Diaz
10. Elena Duran
11. Zoe A. Gilkison
12. Catherine M. Hendon
13. Margaret E. Hewitt
14. Patricia Madrid
15. Diedre Nelms
16. Susan K. Reed
17. Patricia J. Reyes
18. Nancy Schneider
19. Martha Sida
20. Elizabeth Sierra
21. Patricia E. Spencer
22. Andrea Villanueva

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Authorities iv

Reference to Reported Case 1

Jurisdictional Statement 1

Statutory Reference 1

Statement of the Case 2

Argument 9

I. The Court of Appeals erred by failing to grant appropriate deference (any deference) to the factual findings of the District Court judge and jury. 9

II. The Fifth Circuit's misstatements of the record. 13

Summary 14

TABLE OF AUTHORITIES

Page

Cases

Beardsley v. Webb,
30 F.3d 524, 530 (4th Cir. 1994) . . . 9, 10, 12

Harris v. Fork Lift Systems, Inc.
__ U.S. ___, 114 S.Ct. 367 (1993) . . . 9

Pullman Standard v. Swint,
456 U.S. 273, 102 S.Ct. 1781 (1982) . . 10

Simms v. Montgomery County,
766 F.Supp 1052 (M.D.Ala. 1990) 12

Wilson v. Wayne County,
856 F.Supp. 1254 (M.D.Tenn. 1994). . . 12

Statutes

28 U.S.C. §1254(1) 1
28 U.S.C. §1343(4) 8
42 U.S.C. §2000e-2(a). 1
42 U.S.C. §2000e-5(f)(3) 8

Supreme Court Rules

Rule 14 1
Rule 14(b) ii
Rule 14(d) 1
Rule 14(e) 1
Rule 14(f) 1
Rule 14(g) 2
Rule 14(i) 8
Rule 16.2 14

The following mandatory information is included in compliance with **Rule 14** of the Supreme Court Rules.

Rule 14(d): This case is reported at 51 F.3d 591 (5th Cir. 1995).

Rule 14(e): The Court of Appeals entered its judgment on May 10, 1995. This court has jurisdiction to review the judgment by writ of certiorari under **28 U.S.C. §1254(1).**

Rule 14(f): The statutory provision most directly involved is **42 U.S.C. §2000e-2(a)** which is set out verbatim herein.

"(a) **Employer practices**

It shall be an unlawful employment practice for an employer--

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin."

Rule 14(g):

STATEMENT OF THE CASE

Sylvia DeAngelis was the highest ranking female police officer in the history of El Paso. When she first made sergeant, the El Paso Municipal Police Officers Association ("Union") published an article in the Union newspaper referring to her as a "Sergeant Dingy Woman." The column greatly embarrassed Sgt. DeAngelis and undermined her authority to supervise male police officers.

After she filed an EEOC charge, the Union published a follow-up column mocking her "E-I-E-I-O" charge. Over the next two years, on an intermittent but regular basis, it published columns mocking female police officers in general and, on some occasions, Sgt. DeAngelis in particular.

In February 1990, the Union published a column which was extremely sexist and offensive. That column is in the Appendix. Representative samples are set out below.

> "Let's face it! broads are just too small and can't deal with man at his root, gut only the strongest survive level!"
>
> *****
>
> "Women ain't got it; for we'all just made differen't! Women, men and combat just don't mix for it ain't in the Lards plan! Of course, the Libbers just can't take that!"
>
> *****
>
> "Oh shure, anyone can write reports, and anyone can direct traffic but when the S_____ really hits the fan, ya don't turn to the closest 110# female to back you up."
>
> *****
>
> "Physically, the police broads just don't got it!"

The February 1990 column had highly significant ramifications. First, the Chief of Police, who had previously issued a memo criticizing these columns as sexist and

racist, issued a follow-up memo, which is in the Appendix. It states, in part:

> " In the last issue of the "Silver Badge" an article by R.U. Withmi attacked female police officers. I found this article to be personally distasteful and divisive, ...
>
> With this memo, I am putting all Department employees on notice that any form of discrimination or sexual harassment can not and will not be tolerated by the El Paso Police Department. Where necessary, appropriate disciplinary action will be taken."

Also as a direct result of the publication of the February 1990 column, twenty-two female police officers filed a lawsuit in the 210th District Court in El Paso County, *Barrett et al v. El Paso Municipal Police Officers Association*, No. 90-2568 (which is being held in abeyance pending a final resolution of the instant case).

As a further consequence of this article, the Union's Executive Board changed the editorial policy to prohibit the publication of such anonymous articles. However, in

clear defiance of the Executive Board's actions and the Chief's memo, the Union membership voted 78 to 14 to override the Executive Board and to continue the column, with no changes in the criteria for publication.

The Union newspaper had wide circulation. Each month one thousand issues were printed. Approximately seven hundred were distributed to the police officers, over ninety percent of whom were male. The remaining three hundred were circulated throughout the law enforcement community in El Paso and West Texas.

The recurring publication of sexist columns and the Union's continuing endorsement of their content caused severe distress to Sgt. DeAngelis. She had great difficulty supervising male subordinates who, on numerous occasions, would mock and insult her, sometimes in the presence of arrestees. She had previously passed a

promotional examination for a lieutenant's position. However, when no open slots arose and the list expired, she refused to retake the exam because she did not want to go through the trauma of again being the first female to break ground at a new level. She could not sleep at night because of excessive crying and grinding of her teeth to the point where her jaws and back hurt.

The EEOC issued a determination finding that the Union discriminated against Sgt. DeAngelis because of her sex by creating and perpetrating a hostile work environment. It further found that the Union retaliated against her. At trial, an El Paso jury unanimously found that the Union sexually harassed Sgt. DeAngelis by creating and perpetuating a hostile work environment and further found retaliation. Judge Lucius Bunton, the former Chief Judge of the Western District of Texas who had taken senior status, then entered a judgment for

Sgt. DeAngelis based upon the jury findings and amended the judgment to include his own observations and to grant declaratory relief in the following language:

> " Plaintiff properly pled for declaratory relief. Based upon the jury verdict and this Court's independent review of the evidence, it is hereby ORDERED that Plaintiff have a DECLARATORY JUDGMENT. It is hereby DECLARED that the Defendant sexually harassed the plaintiff by printing, publish, and distributing the "R.U. Withmi" columns contained in Defendant's December 1987, February 1988, March 1988, August 1988, October 1988, January 1989, February 1989 and April 1990 newsletters.
>
> It is further DECLARED that the Defendant retaliated against Plaintiff by publishing the February 1988 and February 1989 issues of the Union newspaper." [1]

The Fifth Circuit determined that there was insufficient evidence to support Sgt. DeAngelis' claim of a sexually harassing work environment, and insufficient evidence to support a finding of retaliation.

---

[1] The February 1990 issue was omitted through an apparent typographical error.

DeAngelis, supra, at 596-97. It therefore reversed and rendered a judgment against Sgt. DeAngelis.

Rule 14(i): The basis for federal jurisdiction in the trial court was **42 U.S.C. §2000e-5(f)(3)** and **28 U.S.C. §1343(4)**.

ARGUMENT

I.

The Court of Appeals erred by failing to grant appropriate deference (any deference) to the factual findings of the District Court judge and jury.

In *Harris v. Fork Lift Systems, Inc.* __ U.S. ___, 114 S.Ct. 367 (1993), it was re-affirmed that sexually discriminatory verbal intimidation ridicule and insults may create an abusive work environment. To determine whether a working environment is "hostile" or "abusive" all circumstances must be considered. *Id*, at __ 114 S.Ct. at 371.

Therefore, a finding of sexual harassment is a finding of fact. In reviewing a sex harassment/hostile environment finding, the Court of Appeals for the Fourth Circuit stated:

> "Whether the evidence supported Beardsley's claim or Webb's defenses depended largely on the credibility of the witnesses and the inferences the jury could reasonably draw from the facts. Whether Webb's "harassment was

> sufficiently severe or pervasive is quintessentially a question of fact."
>
> *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (internal citations omitted).

Such quintessential questions of fact should be reviewed under the "clearly erroneous" standard set out in *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982). They should not be disturbed unless they are clearly lacking in evidentiary support.

The findings for Sgt. DeAngelis are supported by extensive and overwhelming evidence. The Fifth Circuit's cavalier disregard of that evidence is so gross an error as to necessitate review by this court.

Sgt. DeAngelis was personally insulted in the Union newspaper and was also subjected to blatantly sexist insults directed at all female police officers. Portraying the publication of such columns, each of which was published in one thousand issues and

widely disseminated, as "mere offensive utterances" is ridiculous.

The publications in question were incontrovertibly demeaning to women. The Fifth Circuit itself refers to them as "tasteless." Referring to female police officers as "broads", dogs, and ridiculing their ability to perform their jobs could certainly, under some circumstances, constitute a hostile working environment.

The evidence which indicates that there was a hostile working environment caused by the publication of this material is extensive. The Chief of Police wrote two strong memos criticizing the columns and threatening appropriate disciplinary action. Twenty-two female officers sued the Union. The Union president believed the columns were offensive to women, as did the Union Executive Board, both of which were powerless to override the membership and prevent the continuing publication of the

columns. The EEOC found that a hostile working environment was created. A jury found that a hostile working environment existed and a senior federal judge made his own independent review of the evidence and issued appropriate declaratory relief.

The Fifth Circuit Court of Appeals, the only body which heard no evidence, found factual insufficiency.

Numerous courts have recognized, and been sensitive to, the problem of sexism in law enforcement agencies. *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994); *Wilson v. Wayne County*, 856 F.Supp. 1254 (M.D.Tenn. 1994); *Simms v. Montgomery County*, 766 F.Supp 1052 (M.D.Ala. 1990). In contrast, the Fifth Circuit, failed to recognize what was clear to the Police Chief, the Union president, the Union Executive Board, twenty-two female police officer litigants, the EEOC, the jury, and Judge Bunton - that macho police

officers were out of control. Instead, the Fifth Circuit equated Sgt. DeAngelis' efforts to work in an environment free from such atrocities as an effort to become a model "of Victorian reticence." 51 F.3d at 593. Its analysis would be laughable, were it not so pathetically ignorant.

II.

The Fifth Circuit's misstatements of the record.

In order to justify its otherwise unjustifiable finding of factual insufficiency, the Fifth Circuit opinion falsely recounts the evidence.

The worst distortion of the record appears on page 595 when the Fifth Circuit summarizes the February 1990 column into a single paragraph. The Supreme Court can compare the entire column in the Appendix with the Fifth Circuit summary.

A second misstatement occurs on page 594 of the opinion when the Fifth Circuit states that each column bore a disclaimer. Although some columns bore disclaimers, others did not. In fact, the pivotal February 1990 column did not contain any disclaimer.

SUMMARY

It is recognized that, historically, factual determinations are not reviewed. However, because the Fifth Circuit did not extend deference to the well supported findings of the District Court judge and jury and because the Fifth Circuit grossly distorted the facts, this court should exercise its supervisory powers.

Petitioner prays that this court enter an order, in accordance with **Rule 16.2**, granting the Writ of Certiorari, requesting the clerk of the court of appeals for the

Fifth Circuit to transmit the record, and scheduling briefing and oral argument.

Respectfully submitted

THOMAS A. SPIECZNY
Counsel for Petitioner
State Bar No. 18933100
521 Texas Avenue
El Paso, TX 79901
Tel: (915) 533-5581
Fax: (915) 532-1515